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5 HUNG PHI PHAM,
6 Plaintiff,
7 v.
8 MOISES BECERRA, et al.,
9 Defendants.

10 Case No. 23-cv-01288-CRB
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12

**13 ORDER GRANTING PETITION
14 FOR WRIT OF HABEAS CORPUS**

15 In March 2023, Petitioner Hung Phi Pham (Pham), was detained at Golden State
16 Annex pending removal proceedings pursuant to 8 U.S.C. § 1226(c), a federal mandatory
17 detention statute for aggravated felony convictions. The Government refused to provide
18 Pham with a bond hearing, so Pham filed a petition for writ of habeas corpus and a motion
19 for a temporary restraining order, arguing that due process entitled him to a bond hearing.
20 See Pet. (dkt. 1). This Court granted a temporary restraining order (TRO) enjoining the
21 Department of Homeland Security and Respondents from continuing to detain Pham
22 without a bond hearing. Order Granting TRO (dkt. 20). Thereafter, an Immigration Judge
23 (IJ) ordered Pham to be released on a minimum bond of \$1500. See Stipulation (dkt. 23).

24 Following Pham's posting of bond and release from custody, the Government filed
25 a return requesting that this Court dismiss Pham's habeas petition. See Return (dkt. 27).
26 Pham then filed a traverse requesting that this Court affirm that a bond hearing was
27 required by due process under the Fifth Amendment and to permanently enjoin the
28 Government from detaining Pham without a bond hearing. See Traverse (dkt. 28). The
Court GRANTS Pham's petition for habeas corpus and permanently enjoins Defendants
from detaining Pham pursuant to 8 U.S.C. § 1226(c) based on criminal convictions that

1 pre-date the Court's order, for more than five days without a bond hearing, at which the
2 Government bears the burden of justifying Pham's detention by clear and convincing
3 evidence.

4 **I. BACKGROUND**

5 **A. Pham's Background and Criminal Conviction**

6 Pham was born in Vietnam and came to the United States on a nonimmigrant
7 student visa in 2008. Pham Decl. (dkt. 1-1) ¶¶ 1–3. In 2010, Pham became a lawful
8 permanent resident. Id. ¶ 5

9 In February 2013, while he was a student at University of California, Santa Cruz,
10 Pham sexually molested another student. See id. ¶ 8. Pham was convicted in Santa Clara
11 County Superior Court for violation of California Penal Code § 289(e) (Sexual Penetration
12 When the Victim was Intoxicated or Anesthetized) in March 2015 and sentenced to 364
13 days in county jail. Palakiko Decl. (dkt. 15-1) ¶¶ 6–7. Pham served six months in jail and
14 was released in August 2015. Pham Decl. ¶ 15.

15 Following his release, Pham completed three years of probation and registered as a
16 sex offender in California. Id. ¶¶ 18, 22. Due to the difficulty of pursuing a career as a
17 pharmacist—the career he had been attending school for—with a felony conviction, Pham
18 worked in construction for his uncle. Id. ¶¶ 13, 23. He completed rehabilitation and
19 alcohol abuse programs. Id. ¶ 18. In January 2020, he married, Han Nguyen Khanh
20 Duong (Duong), a U.S. citizen, and in August 2020, they had their first child together. Id.
21 ¶ 26.

22 **B. Pham's Naturalization**

23 In June 2021, Pham applied for U.S. citizenship. Id. ¶ 27. On his naturalization
24 application, he included his current address and disclosed his conviction. Id. ¶ 28. In
25 April 2022, Pham appeared at the United States Citizenship and Immigration Services
26 (USCIS) office in Santa Clara for an interview in support of his naturalization application.
27 Id. There, the USCIS officer informed Pham that a decision was still pending on his
28 application. Id.

1 On January 19, 2023—nine months after Pham’s interview, more than a year and a
2 half after he submitted his naturalization application, and seven years after his release from
3 criminal custody—United States and Customs (ICE) officers removed Pham from his
4 home and took him into custody at a private detention facility. Id. ¶ 30. Duong, who
5 answered the door, was nine months pregnant with their second child. Id. Pham and
6 Duong’s second child was subsequently born while Pham remained in ICE detention. Id. ¶
7 36.

8 **C. Detention and TRO**

9 Pham was detained at Golden State Annex, a private detention facility in
10 McFarland, California, pending his removal proceedings. Id. ¶ 30; Ballout Decl. (dkt. 1-3)
11 ¶ 5. In February 2023, an IJ determined that under 8 U.S.C. § 1226(c), Pham was not
12 entitled to a bond hearing. See Ballout Decl. ¶ 5. Pham appealed this determination. See
13 Palakiko Decl. Ex. H. On March 16, three months after Pham’s detention began, the IJ
14 sustained the charge of removability against Pham. Id. Pham thereafter filed a petition for
15 writ of habeas corpus and a motion for a TRO, arguing that due process entitled him to
16 bond hearing. See Pet. This Court granted the TRO on March 31, 2023, ordering the
17 Government to provide Pham with a bond hearing within five days, at which the
18 Government would bear the burden of proof. See TRO at 1.

19 **D. Developments Since the TRO**

20 On April 5, 2023, an IJ conducted a bond hearing and ordered Pham to be released
21 on a minimum bond in the amount of \$1,500. See Stipulation (dkt. 23). ICE did not
22 appeal that bond order to the Board of Immigration of Appeals (BIA). See Suppl. Pham.
23 Decl. (dkt. 28) ¶ 2. The Court granted the parties’ stipulation to vacate the briefing
24 schedule for the preliminary injunction, set a briefing schedule for the underlying habeas
25 petition, and extended the temporary restraining order until the petition is adjudicated. Id.

26 The Government now reraises arguments that the Court considered and rejected in
27 the TRO order.

II. JURISDICTION

Before the Court can address the merits of Pham's habeas petition, the Court must first consider whether this Court has habeas jurisdiction over the matter. Federal district courts are limited to granting habeas relief "within their respective jurisdictions," which means that the district court must have jurisdiction over the plaintiff's custodian. 28 U.S.C. § 2241(a); see Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004). The Government contends that under Rumsfeld v. Padilla's district-of-confinement rule, this Court does not have jurisdiction because Pham was detained in the Eastern District of California. The Government also argues that even if the rule does not apply, the proper respondent and custodian is similarly outside of this Court's jurisdiction. The Court will first address why Padilla's district-of-confinement rule does not apply to this case and will next address why Pham has named the proper respondent.

A. The District-of-Confinement Rule

In Padilla, the Supreme Court considered whether the Southern District of New York had jurisdiction over a habeas petition brought by a U.S. citizen detained in military custody in South Carolina. Padilla, 542 U.S. at 435. The Court held that the "default rule" in habeas challenges to present physical confinement is the "district of confinement rule"—that is, "the proper respondent is the warden of the facility where the prisoner is being held." Id. at 446. Applying that rule, the Court concluded that the proper respondent in Padilla's case was the commander of the naval brig who "exercis[ed] day-to-day control over [his] custody." Id. Because the commander of the naval brig was in South Carolina, the Court concluded that the Southern District of New York did not have jurisdiction over Padilla's petition.

However, Padilla did not establish a bright-line district-of-confinement rule. The Court expressly declined to decide the proper respondent in the immigration context—like the case at bar.¹ Id. at 435 n.8. Nor did Padilla address which court has jurisdiction when

¹ The Government argues that the district-of-confinement rule should govern, especially when neither this Court, nor the "other district-court decisions that the TRO cited . . . discuss[] the actual text of the habeas statute . . ." Return at 6. First, the Court disputes this as a factual matter as both

1 the detainee is confined in a private facility, as opposed to the public facility at issue in
2 Padilla.²

3 The Government argues otherwise, citing a slew of brief and unpublished cases that
4 are not relevant to the precise facts of this case. The facts here involve a noncitizen
5 petitioner detained in a private facility located in a different district from where the
6 custodian responsible for the facility is located. See TRO at 5. While many of the cases
7 cited involve detainees held in private facilities, there is no indication that the detainees
8 were in a different district from where the respondent was located, much less a dispute as
9 to who the proper respondent should be, as there is in this case. The cases consist of three-
10 paragraph opinions construing appeals from an IJ or the BIA as habeas petitions, and then
11 transferring those petitions to the district where the petitioner was detained—many of them
12 arising as motions of release because of the COVID-19 pandemic. See Chavez v. Barr,
13 No. 20-70461, 2020 WL 13017244 (9th Cir. Apr. 30, 2020); Calderon v. Barr, No. 19-
14 72548, 2020 WL 13033204 (9th Cir. Apr. 30, 2020); Birru v. Barr, No. 19-72758, 2020
15 WL 12182460 (9th Cir. Apr. 30, 2020).

16 Similarly, in Lopez v. Marroquin v. Barr, 955 F.3d 759 (9th Cir. 2020), the Ninth
17 Circuit construed an emergency motion to remand in a noncitizen’s appeal from the BIA as
18 a petition for a writ of habeas corpus. The court transferred the case to where the

19
20 the Court and the cases relied upon, cite to the habeas statute. Second, the Government, itself,
21 fails to engage with the statutory text but instead relies primarily on Padilla, a case that explicitly
22 declined to address the rule in the immigration context.

22 ² The Government claims that Padilla reaffirmed the Ahrens v. Clark, 335 U.S. 188 (1948)
23 district-of-confinement rule for “all habeas petitions.” Return at 10. This assertion is misguided
24 given that Padilla expressly declined to address habeas jurisdiction for noncitizen detainees.
25 Further, as the Government concedes, Ahrens was overruled by Braden v. 30th Judicial Cir. Ct.,
26 410 U.S. 484 (1973). Braden held that a court has habeas jurisdiction so long as it has jurisdiction
over the respondent. Id. at 1129-1130. Padilla narrowed Braden’s holding to apply to challenges
to “future confinement.” Padilla, 542 U.S. at 442. Because Pham is currently out of custody on
bail, his habeas petition concerns his future confinement as well. Thus, Pham is under the gambit
of Braden.

27 Even if Braden is not controlling here, the Supreme Court has not established a bright-line
28 district-of-confinement rule that is applicable to this case. Neither Padilla nor Ahrens address
whether the district-of-confinement rule should govern when the noncitizen detainee is detained in
a private facility that is located in a different district from where the respondent is based.

1 petitioner was being detained, citing to Padilla. Id. at 760. However, the court did not
2 address the jurisdictional question presented in this case. Id.

3 It is beside the point that some of these cases involve “detainees being held at non-
4 federal facilities” because that is only one factual component of this case. Return at 6. To
5 advance their position, the Government would need to cite authority that actually decides
6 the jurisdictional issue as opposed to cases that merely illustrate the court exercising its
7 discretion to initiate a transfer. Accordingly, in line with the consensus of courts in this
8 district that have addressed this precise issue, the district-of-confinement rule does not
9 apply to this case.³

10 **B. The Proper Respondent**

11 Pham’s habeas corpus petition names San Francisco Field Office Director (FOD)
12 Moises Becerra, who is based in the Northern District of California, as the respondent.
13 The Government argues that Acting Assistant Field Office Director (AAFOD) Nancy
14 Gonzalez, who is based in the Eastern District of California, is the proper respondent. For
15 reasons that will be set forth below, the Court concludes that Pham is correct.

16 Before Pham was released on bond following this Court’s TRO order, Pham was
17 detained at Golden State Annex, a private detention facility located in McFarland,
18 California, which is in the Eastern District of California. Becerra is the FOD of ICE’s San
19 Francisco Field Office, which has authority over Pham’s custody and over the Golden
20 State Annex. See Pet. ¶¶ 11-12. FOD Becerra’s responsibilities include the management
21 and director of all Enforcement Removal Operations (ERO) and law enforcement

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23 ³ See, e.g., Ameen v. Jennings, No. 22-CV-00140-WHO, 2022 WL 1157900 (N.D. Cal. Apr. 19,
24 2022); Henriquez v. Garland, No. 5:22-CV-00869-EJD, 2022 WL 2132919 (N.D. Cal. June 14,
25 2022), appeal dismissed, No. 22-16205, 2022 WL 18587903 (9th Cir. Dec. 28, 2022); Domingo v.
26 Barr, No. 20-CV-06089-YGR, 2020 WL 5798238 (N.D. Cal. Sept. 29, 2020); Doe v. Barr, No.
27 20-CV-02263-RMI, 2020 WL 1984266 (N.D. Cal. Apr. 27, 2020); Hilario Pankim v. Barr, No.
28 20-CV-02941-JSC, 2020 WL 2542022 (N.D. Cal. May 19, 2020); Saravia v. Sessions, 280 F.
Supp. 3d 1168 (N.D. Cal. 2017), aff’d sub nom. Saravia for A.H. v. Sessions, 905 F.3d 1137 (9th
Cir. 2018); Singh v. Barr, No. 20-CV-02346-VKD, 2020 WL 2512410 (N.D. Cal. May 15, 2020);
Ortuno v. Jennings, No. 20-CV-02064-MMC, 2020 WL 2218965 (N.D. Cal. May 7, 2020);
Montoya Echeverria v. Barr, No. 20-CV-02917-JSC, 2020 WL 2759731 (N.D. Cal. May 27,
2020); Salesh P. v. Kaiser, No. 22-CV-03018-DMR, 2022 WL 17082375 (N.D. Cal. Nov. 18,
2022); Meneses v. Jennings, No. 21-CV-07193-JD, 2021 WL 4804293 (N.D. Cal. Oct. 14, 2021).

1 operations located within the geographic boundaries of the San Francisco Area of
2 Responsibility. Gonzalez Decl. (dkt. 15-2) ¶ 7. FOD Becerra oversees Deputy Field
3 Office Director (DFOD) Orestes L. Cruz, who is based in the Eastern District and is
4 responsible for providing discretion and oversight of ICE immigration enforcement
5 operations within the California counties of Fresno, Inyo, Kern, Madera, Mariposa,
6 Merced, Mono, and Tulare. Id. DFOD Cruz is the direct supervisor of AAFOD Nancy
7 Gonzalez, who is based in the Eastern District and is assigned to the Bakersfield Sub-
8 Office within ERO San Francisco, which is responsible for oversight of noncitizens
9 detained at Golden State Annex. Id. AAFOD Gonzalez is responsible for providing
10 support to FOD Becerra and DFOD Cruz. Id.

11 Given that both DFOD Cruz and AAFOD Gonzalez report to FOD Becerra, it is
12 FOD Becerra that exercises control over Pham's custody. See, e.g., Ameen v. Jennings,
13 No. 22-CV-00140-WHO, 2022 WL 1157900, at *4 (N.D. Cal. Apr. 19, 2022), appeal
14 dismissed, No. 22-15912, 2023 WL 9054160 (9th Cir. Sept. 1, 2023) (“Given the clear
15 chain of command, respondents’ suggestion that a lower-level ICE office – one who
16 reports to [Becerra] but is located in a district office within the Eastern District of
17 California – is not a sufficient substitute.”); Meneses, 2021 WL 4804293, at *2 (holding
18 that the San Francisco FOD is the proper respondent despite the government’s arguments
19 “suggesting that a better candidate might be the assistant field director . . . assigned to the
20 Bakersfield Sub-Office” because “any habeas relief ordered by the Court would
21 necessarily be directed to the San Francisco office”). This Court held in its TRO order that
22 FOD Becerra is the proper respondent; the Government fails to introduce any new factual
23 evidence now to suggest otherwise.

24 The Government instead reads Sarvia v. Sessions, 280 F. Supp. 3d 1168, 1187
25 (N.D. Cal. 2017) to hold that low-level field specialists are better suited as respondents
26 than director-level officials because they exercise more immediate control over private
27 facilities. See Return at 9. This reading of Sarvia is erroneous. Sarvia involved a dispute
28 between whether a federal official or a Chief Probation Officer, who acted as the warden

1 of a private facility, should be the proper respondent. Sarvia, 280 F. Supp. 3d at 1185.
2 Because federal officials were better suited to defend federal interests, the court held that
3 the proper respondent was the “federal official tasked with ensuring Yolo County complies
4 with the requirement of its contract.” Id. at 1186. Whether the respondent was a “low-
5 level” or a “director-level” official was not dispositive, let alone a consideration in the
6 opinion.

7 Even assuming for a moment that it was a consideration, the Government has it
8 backwards—the federal official in Sarvia is more like a “director-level official” than a
9 low-level one. Resembling the federal official in Sarvia, FOD Becerra holds management
10 responsibilities, including ensuring compliance from all ERO. AAFOD Gonzalez’s
11 declaration does not persuade the Court that she is the “federal official most directly
12 responsible for overseeing” Golden State Annex. See Gonzalez Decl. ¶ 1 (declaring that
13 Gonzalez is “responsible for providing support” to DFOD Cruz and FOD Becerra “in
14 managing operations and procedures of enforcement and removal activity . . . which
15 includes but is not limited to providing oversight and supervision of” Golden State Annex).

16 Consequently, as it did in its TRO order, this Court stands with the courts in this
17 district that have held that FOD Becerra is the proper respondent. Gomez v. Becerra, No.
18 23-cv-03724-JCS, 2023 WL 6232236, at *6 (N.D. Cal. Sept. 25, 2023) (“Here, as in the
19 many other cases in which this Court has addressed the question, there is no dispute that
20 the San Francisco FOD is the person with primary authority over Petitioner’s arrest and
21 detention.”); I.E.S. v. Becerra, No. 23-CV-03783-BLF, 2023 WL 6317617, at *5 (N.D.
22 Cal. Sept. 27, 2023) (“The Court concurs with the approach of other courts in this district,
23 which have repeatedly held that lower-level ICE officials are not appropriate
24 respondents.”). Therefore, this Court has jurisdiction over Pham’s petition.

25 **III. LEGAL STANDARD**

26 Federal district courts may grant writs of habeas corpus if the petitioner is “in
27 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
28 § 2241(c)(3). The proper vehicle through which to challenge the constitutionality of a

1 noncitizen's detention without bail is 28 U.S.C. § 2241. Demore v. Kim, 538 U.S. 510,
2 516–17 (2003). "A person need not be physically imprisoned to be in custody under the
3 statute; instead, habeas relief is available where the individual is subject to 'restraints not
4 shared by the public generally.'" Ortega v. Bonnar, 415 F. Supp.3d 963, 967–68 (N.D.
5 Cal. 2019) (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)). Proper remedies for
6 habeas petitions include declaratory and injunctive relief. See id. at 970 (enjoining ICE
7 from re-arresting petitioner without a bond hearing); see also Perera v. Jennings, 598 F.
8 Supp. 3d 736, 747 (enjoining ICE from re-arresting petitioner without a bond hearing).

9 **IV. DISCUSSION**

10 Pham argues that detention under § 1226(c) without a bond hearing violates the due
11 process clause of the Fifth Amendment, as applied to him. The Government argues that
12 Pham does not have a protected liberty interest under the due process clause of the Fifth
13 Amendment. Upon analysis of the Mathews factors, the Court concludes that Pham
14 succeeds on his due process claim. Mathews v. Eldridge, 424 U.S. 319 (1976).

15 **A. Due Process Analysis**

16 **1. Legal Framework**

17 8 U.S.C. § 1226 sets forth whether the government may detain or release
18 noncitizens during removal proceedings. Under the "default rule" of § 1226(a), the
19 government "may release" or "may continue to detain" an arrested noncitizen "pending a
20 decision" on their removal. 8 U.S.C. § 1226(a); see also Nielsen v. Preap, 139 S. Ct. 954,
21 956 (2019) ("Aliens who are arrested because they are believed to be deportable may
22 generally apply for release on bond or parole while the question of their removal is being
23 decided."). Section 1226(c), titled "Detention of Criminal Aliens," instructs that the
24 government "shall take into custody any alien" who has committed various types of
25 criminal offenses "when the alien is released."⁴

26
27 ⁴ The parties do not dispute that Pham's conviction is an "aggravated felony" rendering him
28 deportable under 8 U.S.C. 1227(a)(2)(A)(iii) and that Pham was previously detained subject
to § 1226(c), not § 1226(a). See also 8 U.S.C. § 1101(a)(43)(A) (defining "aggravated felony" as
"murder, rape, or sexual abuse of a minor"). Accordingly, the Court operates on the assumption

1 The Supreme Court has addressed the meaning, application, and constitutionality of
2 § 1226(c) piecemeal. In Demore v. Kim, the Court held that § 1226(c) was constitutional
3 on its face. 538 U.S. 510, 530 (2003); but see id. at 532–33 (Kennedy, J., concurring)
4 (“Were there to be an unreasonable delay by the INS in pursuing and completing
5 deportation proceedings, it could become necessary then to inquire whether the detention
6 is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to
7 incarcerate for other reasons.”); see also Jennings v. Rodriguez, 138 S. Ct. 830, 847 (2018)
8 (holding that the text of 1226(c) does not allow for the imposition of periodic bond
9 hearings during detention pending a removal decision). In Nielsen v. Preap, the Court held
10 that § 1226(c) does not require bond hearings even for noncitizens (like Pham) whose
11 removal proceedings (and detention) commenced long after their release from criminal
12 custody. 139 S. Ct. at 959. But while declining to apply the canon of constitutional
13 avoidance to its statutory holding, the Preap Court explicitly reserved the type of as-
14 applied constitutional challenge that Pham now brings. See Preap, 139 S. Ct. at 972 (“Our
15 decision today on the meaning of that statutory provision does not foreclose as-applied
16 challenges—that is, constitutional challenges to applications of the statute as we have now
17 read it.”).

18 The due process protection “applies to all ‘persons’ within the United States,
19 including aliens, whether their presence here is lawful, unlawful, temporary, or
20 permanent.” Zadvydas v. Davis, 533 U.S. 678, 693 (2001). Detention violates due
21 process absent “adequate procedural protections” or “special justification[s]” sufficient to
22 outweigh the “constitutionally protected interest in avoiding physical restraint.””
23 Zadvydas, 533 U.S. at 690 (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).

24 Courts apply three factors from Mathews v. Eldridge, 424 U.S. 319 (1976), to
25 determine what the “specific dictates of due process” require in a particular case: “First,
26 the private interest that will be affected by the official action; second, the risk of an

27
28 that Pham has no statutory entitlement to a bond hearing. See Preap, 139 S. Ct. at 960, 968.

1 erroneous deprivation of such interest through the procedures used, and the probable value,
2 if any, of additional or substitute procedural safeguards; and finally, the Government's
3 interest, including the function involved and the fiscal and administrative burdens that the
4 additional or substitute procedural requirement would entail." 424 U.S. at 335.

5 **2. Mathews Factors**

6 **a. Liberty Interest**

7 Pham argues that he has a liberty interest in freedom from ICE detention and that
8 this liberty interest is heightened by his exemplary conduct during the period between his
9 release from custody and ICE detention. See Traverse at 7. As it did in opposing Pham's
10 motion for a TRO, the Government argues that Pham does not have a protected liberty
11 interest because the lapse of time between Pham's release from state custody and arrest by
12 ICE is insufficient to establish a protected liberty interest. See Return at 13.

13 The Government's argument is based on a faulty premise. Pham's liberty interest
14 does not depend on the Government's diligence, or lack thereof, in detaining him. See
15 Zadvydas, 533 U.S. at 335. Rather, Pham has an independent liberty interest in being free
16 from physical restraint.⁵ As Judge Freeman held in Perera, "the main private interest at
17 stake in the instant matter is Perera's '[f]reedom from imprisonment—from government
18 custody, detention, or other forms of physical restraint.'" Perera, 2021 WL 2400981, at *4
19 (quoting Zadvydas, 533 U.S. at 690). This interest persists no matter the length of his
20 detention. See id. (quoting Rajnish v. Jennings, No. 3:20-cv-07819-WHO, 2020 WL
21 7626414, at *6 (N.D. Cal. Dec. 22, 2020)). The Court incorporates its analysis from its
22 TRO order, which holds that Pham has a protected liberty interest that would be affected
23 by the deprivation of a bond hearing. This factor is weighs in Pham's favor.

24

25 ⁵ The Government spends a significant time in their brief attempting to distinguish this case from
26 Perera, 598 F. Supp. 3d. 736. The Government argues that unlike in Perera wherein ICE took six
27 years to detain the noncitizen after notification of release, Pham's release from custody did not
28 come to ICE's attention until September 2022, approximately four months before ICE detained
Pham. See Return at 15. Putting aside that the record is insufficient to establish this timeline, this
Court and for that matter, the Perera court, rejected that a detainee's liberty interest depended on
the length of time the federal government knew of the conviction and failed to initiate removal
proceedings. See TRO at 11; see Perera, 2021 WL 2400981, at *4.

b. Bond Hearing

Having found that Pham has a liberty interest, we assess the other Mathews factors—the risk of erroneous deprivation, and the Government’s interest—to determine whether Pham is entitled to a bond hearing. Mathews, 424 U.S. at 335. In accord with Judge Freeman’s conclusion in Perera, the other Mathews factors “unquestionably weigh in favor of” Pham. Perera, 20201 WL 2400981, at *4.

The risk of erroneous deprivation is significant. The Government, in a conclusory fashion, claims that Pham’s prior criminal conviction “dilutes” his private interest. But the record shows that Pham does not pose a danger to society or present a flight risk—the very justification for mandatory detention. This is further elucidated by the fact that an IJ released Pham on bond following this Court’s TRO order. See Stipulation 22. Pham was released on April 5, 2023, more than nine months ago, and Pham has not been convicted of a crime since March 2015, almost nine years ago. Pham is employed and married with two toddlers. Pham. Decl. ¶ 6. He has served his sentence; completed post-conviction programs, including an alcohol-abuse program; and is by all accounts, a law-abiding citizen. Given this context, the risk of erroneous deprivation is high.⁶

Finally, the government’s interest in detention absent a bond hearing is low. The government certainly has an interest in “efficient administration of the immigration laws” and the administrative burdens inherent in additional procedural protections. Landon v. Plasencia, 459 U.S. 21, 34 (1982). But “the governmental issue at stake in this motion is the ability to detain Petitioner without providing him with [a] bond hearing, not whether the government may continue to detain him” at all. Lopez Reyes v. Bonnar, 362 F. Supp. 3d 765, 777 (N.D. Cal. 2019). “Requiring the government to provide [Pham] with a bond hearing does not meaningfully undermine the government’s interest in detaining non-

⁶ The government’s argument that there is no risk of erroneous deprivation because Pham is subject to mandatory detention without bond under § 1226(c) is circular. See Return at 20. Preap explicitly left open as-applied due process challenges to mandatory detention under § 1226(c). Preap, 139 S. Ct. at 972. It follows that successful due process challenges to mandatory detention would require additional process—i.e., more than none—such as a bond hearing where the government must show that continued detention is justified.

1 citizens who pose a danger to the community or are a flight risk.” Perera, 2021 WL
2 2400981, at *5.

3 Accordingly, balancing the Mathews factors, the Court finds that detention without
4 a bond hearing violates Pham’s right to due process. On that basis, the Court GRANTS
5 Pham’s petition for habeas corpus. The Court next considers whether Pham or the
6 Government should carry the burden of proof at the bond hearing.

7 **B. Burden of Proof at Bond Hearing**

8 Pham asks this Court to affirm its TRO holding that the Government shall bear
9 the burden of proof with clear and convincing evidence at the bond hearing. See Traverse
10 at 12; TRO at 14. The Government argues that Pham should bear the burden of proof
11 because similar statutory provisions place the burden on the noncitizen, and the Supreme
12 Court has never required the government to bear the burden of proof. The Government
13 also reads Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011) to place the burden of proof on
14 the detainee. See Return at 23.

15 As to the Government’s reliance on the statutory burden that applies to bond
16 hearings under 8 U.S.C. § 1226(c)(2) and provisions in the Bail Reform Act that apply to
17 some pretrial detainees, these statutes are inapposite to the case at bar. It is due process,
18 not a detention statute or an implementing regulation, that is the governing standard that
19 applies to Pham’s bond hearing. And while it is true that the Supreme Court has not
20 previously placed the burden of proof on the government at a bond hearing, it is also true
21 that the Supreme Court has never addressed the issue of what due process requires at a
22 constitutionally required, remedial bond hearing.

23 Moreover, Judge Freeman in the Northern District of California found that the
24 Government bore the burden with clear and convincing evidence in a similar case noting:

25 In Singh, the Ninth Circuit held that “the government must prove
26 by clear and convincing evidence that an alien is a flight risk or
27 a danger to the community to justify denial of bond.” 638 F.3d
28 at 1203. While the Ninth Circuit was considering the burden of
proof in the context of a Casas hearing—held after a noncitizen
has faced “prolonged detention while their petitions for review
of their removal orders are pending”—the Court finds that the

1 Ninth Circuit's reasoning applies equally here, contrary to
2 Respondents' arguments. It would be "improper to ask [I.E.S.]
3 to 'share equally with society the risk of error when the possible
4 injury to the individual'—deprivation of liberty—is so
5 significant." *Id.* at 1203–04 (quoting *Addington v. Texas*, 441
6 U.S. 418, 427 (1979)). To the extent that *Rodriguez Diaz* might
7 have called into question Singh's holding as it applies to §
8 1226(c), *Rodriguez Diaz* was limited to § 1226(a) cases and
9 specifically declined to consider whether Singh remains good
10 law in § 1226(c) cases. *See Rodriguez-Diaz*, 53 F.4th at 1202 &
11 n.4. Finally, courts in this district confronted with similar issues
12 have continued to place the burden of proof on the government
13 even after *Rodriguez Diaz*. *See, e.g., Martinez Leiva*, 2023 WL
14 3688097, at *9; *Pham*, 2023 WL 2744397, at *7; *Perera*, 598
15 F.Supp.3d at 746–47.

16 *Becerra*, 2023 WL 6317617, at *10.

17 The Court follows the consensus of the courts in this district and this Court's
18 previous TRO holding that the Government shall bear the burden in a constitutionally
19 mandated bond hearing. *See, e.g., Doe v. Garland*, No. 3:22-CV-03759-JD, 2023 WL
20 1934509, at *2 (N.D. Cal. Jan. 10, 2023) (holding that the government shall bear the
21 burden in a constitutionally required bond hearing in the § 1226(c) context post-
22 *Rodriguez-Diaz*).

23 V. CONCLUSION

24 For the foregoing reasons, the Court GRANTS Pham's petition for writ of habeas
25 corpus. Defendants are permanently enjoined from detaining Pham pursuant to 8 U.S.C. §
26 1226(c) based on criminal convictions that pre-date the Court's order, for more than five
27 days without a bond hearing at which the Government bears the burden of justifying
28 Pham's detention by clear and convincing evidence.

23 IT IS SO ORDERED.

24 Dated: February 15, 2024



25 CHARLES R. BREYER
26 United States District Judge